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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re EMMANUEL D., a Person Coming  
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

EMMANUEL D.,

Defendant and Appellant.

F062372

(Super. Ct. No. JJD062397)

**OPINION**

**THE COURT\***

APPEAL from orders of the Superior Court of Tulare County. Joseph A. Kalashian, Judge.

Linda K. Harvie, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Jeffrey A. White, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Kane, Acting P.J., Poochigian, J., and Detjen, J.

## INTRODUCTION

Emmanuel D. appeals from orders of the juvenile court finding true an allegation that he performed a lewd or lascivious act on a child under the age of 14 years (Pen. Code, § 288, subd. (a)) and later committing him to the Department of Juvenile Facilities (DJF)<sup>1</sup> after he had multiple violations of probation. Emmanuel argues he should be allowed to withdraw his plea. We disagree. Emmanuel further asserts the juvenile court failed to determine whether he had a valid Individual Education Plan (IEP) and that his custody credits were miscalculated. We agree. Emmanuel also challenges his commitment to DJF. Because Emmanuel does not have a prior adjudication for an offense set forth in Welfare and Institutions Code section 707, subdivision (b),<sup>2</sup> we are compelled by California Supreme Court's recent decision of *In re C.H.* (2011) 53 Cal.4th 94 (*C.H.*), to reverse the juvenile court's commitment order to DJF.

## FACTS AND PROCEEDINGS

On October 24, 2007, Emmanuel admitted an allegation that he committed misdemeanor assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). On February 21, 2008, Emmanuel admitted an allegation that he committed a lewd and lascivious act on a child under 14 years of age (Pen. Code, § 288, subd. (a)).<sup>3</sup> Emmanuel also admitted an allegation that he committed substantial sexual contact with a victim

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<sup>1</sup> DJF was formerly known as the California Youth Authority (CYA). DJF was renamed by statutory enactment in 2005. (Welf. & Inst. Code, §§ 202, subd. (e)(5), 1000, 1703, subd. (c), 1710, subd. (a).) The DJF is part of the Division of Juvenile Justice. (Gov. Code, §§ 12838, 12838.3, 12838.5, 12838.13.) DJF is referenced in statutes, such as Welfare and Institutions Code sections 731 and 733, that formerly referred to CYA. (*In re N.D.* (2008) 167 Cal.App.4th 885, 890, fn. 2.)

<sup>2</sup> Unless otherwise noted, all statutory references are to the Welfare and Institutions Code. Section 707, subdivision (b) is hereinafter cited as section 707(b).

<sup>3</sup> This code section will hereafter be referenced as Penal Code section 288(a).

under the age of 14 years within the meaning of Penal Code section 1203.066, subdivision (a)(8).<sup>4</sup> Emmanuel was advised that if he was not found eligible for deferred entry of judgment (DEJ), he would be allowed to withdraw his plea or to request a hearing on his suitability.

In taking Emmanuel's change of plea, the juvenile court observed that the offense was not a section 707(b) offense. Although appellant was informed of the consequences of his plea, he was not orally informed by the court that if he was committed to DJF, he would have to register as a sex offender pursuant to Penal Code section 290. The section 602 petition, however, contained this statement: "Notice is hereby given that adjudication as a ward of the Court for this offense and disposition to the [DJF] will require you to register pursuant to Section 290 of the Penal Code. Willful failure to register is a felony."<sup>5</sup>

On March 28, 2008, Emmanuel affirmed his admission of the allegation even after the court indicated it was going to follow the recommendation of the probation officer, which was to deny DEJ. The court determined Emmanuel was ineligible for DEJ, placed him on probation, and ordered his placement into a group home. The court stated that the maximum term of confinement Emmanuel faced from the petitions was eight years four

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<sup>4</sup> The factual basis for Emmanuel's plea was set forth as follows by the prosecutor: In November 2007, Emmanuel undressed the victim, who was five years old. Emmanuel digitally penetrated the victim and penetrated her vagina with his penis, constituting a violation of Penal Code sections 288(a) and 1203.066, subdivision (a)(8).

<sup>5</sup> The actual reference in the bracketed portion of the quote was to the California Youth Authority. The next paragraph of the petition had the following additional notice: "Conviction of this offense will require you to register pursuant to Penal Code Section 290. Willful failure to register is a crime."

months.<sup>6</sup> Although he was notified of his right to appeal, Emmanuel did not appeal from the orders of the juvenile court from the March 28, 2008, hearing.

On August 4, 2008, Emmanuel waived his rights to a hearing and admitted allegations that he violated the rules of his group home, including that he assaulted other residents of the group home. In explaining the consequences of Emmanuel's admission, the court noted Emmanuel's maximum term of confinement was eight years four months. The parties consented to the disposition at the violation of probation hearing. The court continued Emmanuel's detention, placed him on probation, and authorized the probation department to find a suitable placement for him. Soon thereafter, Emmanuel was placed in a new group home.

On August 12, 2009, Emmanuel waived his rights to a hearing and admitted allegations that he violated the rules, regulations, and reasonable directives of the new group home in which he was placed. The court again advised Emmanuel that a consequence of his admission could be a maximum term of physical confinement of eight years four months. At the disposition hearing later that month, the court continued Emmanuel's detention and probation, ordering his suitable placement into a group home closer to his family. Emmanuel was placed in a new group home.

On February 17, 2011, there was a contested hearing on allegations that Emmanuel again violated the terms and conditions of his probation by failing to abide by group home rules and regulations. Emmanuel's therapist, Donald Weintz, works with the Success and Recovery group home in Tulare County. The program is designed for adolescents who are sexual offenders. Emmanuel was in the program for 14 months prior

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<sup>6</sup> At the hearing, the court verbally announced the maximum term of confinement as eight years eight months. The minute order, however, correctly sets forth Emmanuel's maximum term of confinement for assault as four months and for the Penal Code section 288(a) allegation as eight years, for a total aggregate term of eight years four months.

to December 28, 2010. Emmanuel was terminated from the program for ongoing issues, including bullying, doing what he wanted to do, failing to follow group home rules, and not following the reasonable instructions of group home staff.

During cross-examination, Weintz stated that Emmanuel violated the treatment of avoiding fantasy. Weintz explained the focus of treatment is to stay in reality and to avoid fantasy. Fantasy can be a very dangerous thing for offenders because it can promote sexual fantasies. There were times during Emmanuel's therapy sessions when he would appear to be open about his sexual thoughts, and other times when he was not as open. Emmanuel had sexually violent fantasies that he discussed with Weintz and sometimes showed specific interest in children.

Weintz acknowledged that Emmanuel was generally able to follow the law and did not commit new sexual offenses for 14 months. The court found true the allegation that Emmanuel violated the terms of his probation. On March 11, 2011, the probation department filed its report recommending Emmanuel's commitment to DJF. At the conclusion of a contested disposition hearing on April 15, 2011, the court ordered Emmanuel's commitment to DJF for six years. Emmanuel filed a notice of appeal on April 27, 2011.

### **COMMITMENT TO DJF**

Emmanuel's appellate counsel presented an array of arguments against Emmanuel's commitment to DJF in the opening brief based on statutory analysis, sufficiency of the evidence, and whether the juvenile court adequately considered less restrictive alternatives to DJF commitment. In Emmanuel's reply brief, however, appellate counsel focuses all argument on the Supreme Court's recent decision in *C.H.*

In *C.H.*, the minor committed a violation of Penal Code section 288(a), which is not an offense listed in section 707(b). The minor did not have a more recent violation for an offense listed in section 707(b). (*C.H.*, *supra*, 53 Cal.4th at pp. 98-99.)

Interpreting section 731, subdivision (a)(4) and section 733, subdivision (c), the Supreme Court concluded that because the minor had not committed a 707(b) offense, he could not be sent to DJF. (*C.H.*, *supra*, 53 Cal.4th at pp. 100-103, 108.)

The relevant facts of this case are identical to those in *C.H.* Emmanuel has not committed a section 707(b) offense. The juvenile court, therefore, had no authority to commit him to DJF. (*C.H.*, *supra*, 53 Cal.4th at p. 108.) We, therefore, reverse the juvenile court's disposition order committing Emmanuel to DJF. (*Id.* at p. 109.)

### **WITHDRAWAL OF PLEA**

Emmanuel argues that because he was not adequately advised by the juvenile court of the requirement that he would have to register as a sexual offender (Pen. Code, § 290) after his commitment to DJF, pursuant to Penal Code section 290.008, subdivision (b), he should be entitled to withdraw his plea. We find that Emmanuel's argument is procedurally barred and without merit.

Emmanuel was adjudicated a ward of the court after admitting a violation of Penal Code section 288(a) in February 2008. In March 2008, Emmanuel affirmed his admission after the court found him ineligible for DEJ. Emmanuel was placed on probation in a group home and informed of his right to appeal.

An appeal from a juvenile case is generally made within 60 days after the juvenile court's making of the order being appealed. A timely notice of appeal is essential to appellate court jurisdiction. An appealable order that is not appealed becomes final and may not be subsequently attacked on appeal from a later appealable order or judgment. The juvenile court's orders from the March 2008 hearing were well beyond the 60-day timeline for noticing an appeal and Emmanuel's attempt to appeal those orders now is untimely. (*In re Shaun R.* (2010) 188 Cal.App.4th 1129, 1138.) We reject Emmanuel's argument in his reply brief that he is not subject to forfeiture for failing to file a timely appeal from the court's March 2008 orders.

We further note that Emmanuel's argument fails on the merits. Emmanuel argues that he did not receive notice of the fact that a commitment to DJF would require registration as a sex offender. Although the juvenile court did not expressly advise Emmanuel of the registration requirement, such notice was expressly set forth in the petition filed alleging his violation of Penal Code section 288(a).

Emmanuel argues that the registration notice conflicts with the next notice in the petition stating that if he is "convicted" of the charged offense, he will have to register as a sex offender. Emmanuel reasons that juveniles cannot be convicted of offenses and that there is, therefore, a conflict between the two notices in the petition. We disagree. Juveniles who are tried as adults can be convicted of offenses. (See §§ 602, subd. (b) & 707, subd. (d).) The second notice referring to a conviction is notice to juveniles who are being tried as adults and is not inconsistent with the notice that precedes it. We find that Emmanuel is reading the notice in the petition out of context to create a conflict in the notice provisions of the juvenile petition that does not exist. Emmanuel was not tried as an adult so the second notice provision referring to juveniles receiving convictions is inapplicable to his case.

More importantly, the juvenile court had no authority to commit Emmanuel to DJF. Therefore, the mandatory registration requirements of Penal Code sections 290 and 290.008, subdivision (b), do not apply to Emmanuel because his commitment to DJF was void *ab initio*.

Finally, we note that Emmanuel never challenged his plea or sought to withdraw it at any stage of the proceedings before the juvenile court. Indeed, even after being found ineligible for DEJ, Emmanuel affirmed his change of plea. Emmanuel's challenge to the validity of his plea is being made for the first time in this appeal. We agree with respondent that appellant has failed to establish prejudice by showing it was reasonably probable that he would not have entered the plea admitting the allegation had the court

given the proper advisement. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 210.) This is especially true where, as here, the juvenile court did not have authority to commit Emmanuel to DJF and that commitment is being reversed.

### **SPECIAL NEEDS FINDING AND CUSTODY CREDITS**

The juvenile court did not make a finding regarding Emmanuel's special needs. Emmanuel contends the juvenile court erred in failing to find that he had special needs because there was evidence in the record that Emmanuel had an IEP. Respondent notes there was inconsistent evidence in the record, but agreed there were references in the record to Emmanuel's IEP. Respondent agrees the juvenile court should forward this information to DJF. To the extent that Emmanuel's commitment to DJF is over, this issue is moot. On remand, the juvenile court shall consider Emmanuel's IEP, or other special needs, in its final disposition of this matter.

The parties concede that Emmanuel was only awarded 169 days of custody credits, but was entitled to 171 days of custody credits. On remand, the juvenile court shall add two days of custody credits based on Emmanuel's custody prior to the instant disposition.

### **DISPOSITION**

The juvenile court's order committing Emmanuel to DJF is reversed. The case is remanded for the juvenile court to conduct a new disposition hearing. At the disposition hearing, the juvenile court shall consider Emmanuel's IEP and other special needs, if any, and recalculate his total custody credits.